Supreme Court, U. S.
FILED
DEC 11 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-910

STEPHEN HOROWITZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

EDWIN S. SAUL,
15760 Ventura Boulevard, 9th Floor,
Encino, Calif. 91436,
(213) 995-1521,
Attorney for Petitioner.

Of Counsel:
HOWARD ALLEN LEVY,
15760 Ventura Boulevard, Suite 1123,
Encino, Calif. 91436,
(213) 789-0272.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases	Page
Cady v. Dombrowski, 413 U.S. 1074	4
Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280	6
Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975	4, 5, 6
Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034	4
Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971)	2, 4, 5, 6
Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973)	5, 6

Statutes

California Health and Safety Code, Sec. 11359(a)	2
California Penal Code, Sec. 1538.5	2
United States Code, Title 28, Sec. 1257(3)	1

IN THE

Supreme Court of the United States

October Term, 1979
No. .....

STEPHEN HOROWITZ,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

Petitioner, STEPHEN HOROWITZ, petitions for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District, in this case, entered on July 17, 1979.

Opinions Below.

The opinion of the California Court of Appeal, Second Appellate District, is not reported. The denial of petition for hearing in the Supreme Court of California is not reported.

Jurisdiction.

The judgment of the California Court of Appeal, Second Appellate District, was entered on July 17, 1979. A petition for hearing in the Supreme Court of California was denied on September 12, 1979. The jurisdiction of this Court was invoked under 28 U.S.C. §1257(3).

Questions Presented.

Whether, under the ruling of this Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971) search without a warrant was unreasonable, in that no exigent circumstances existed at the time of the search, and therefore, evidence seized thereby should have been excluded from the trial court.

Statement.

Petitioner was found guilty of possession of marijuana for purpose of sale (violation of California Health and Safety Code §11359(a)), after he entered a plea of guilty and after a denial of his motion to suppress seized evidence under §1538.5 of the California Penal Code. Proceedings were suspended, and Petitioner was placed on probation.

On the night of April 26, 1977, at approximately 8:30 p.m., Petitioner's vehicle, a 1977 Ford, was halted on a Venice, California, street by two "plain clothes", Los Angeles City Police Officers (Officers Soman and Tyndall).

He was stopped due to alleged traffic violations (*i.e.,* running a red light and speeding). Officer Soman later testified that he intended to determine whether the driver of the vehicle was under the influence of drugs or liquor, and if not, to issue the driver a warning.

The petitioner presented his driver's license to the officers. Officer Soman inquired as to the automobile registration and was informed that it was in the glove box. The officer, without petitioner's consent, entered the car and retrieved the rental agreement from the glove box.

While in the automobile, the Officer observed seeds on the floorboard and testified that he smelled a strong odor of marijuana emanating from the rear of the vehicle.

Officer Soman then asked Petitioner for the trunk keys. At first Petitioner agreed, but then, he took the keys from the Officer and told him that he would not consent to any search.

Officer Soman testified that, based upon the smell inside the vehicle, he placed Petitioner under arrest. A marked police car arrived and Petitioner was taken to the police station. The trunk was opened at the scene without a search warrant first being obtained. Marijuana was discovered therein.

REASONS FOR GRANTING THE WRIT.

In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), this Court stated that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 462, 91 S.Ct. at 2035. Rather, search of an automobile without a warrant must be supported not only by probable cause, but also, by one of the recognized exceptions to the warrant requirement.

Three of the accepted exceptions to the warrant requirement, where automobiles are involved, are the "fleeting target" exception (*Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975), the "public safety" exception (*Cady v. Dombrowski,* 413 U.S. 1074), and "search incidental to arrest" (*Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034).

In the instant case, *Cady, supra,* is inapplicable. There is no allegation that a dangerous weapon or emergency was involved. Thus, *Cady* would not serve to justify a warrantless search in this case.

Also, *Chimel* does not justify the search authorities made in this case. In that case, the Court limited warrantless searches to circumstances incident to arrest. Furthermore, said search could only be conducted of Defendant's person or the area within his immediate reach to prevent his obtaining a weapon or destroying evidence.

In this case, although the search was incident to arrest, the search of the trunk was not of an area where Defendant could reasonably be expected to have access to gain a weapon or destroy evidence. Therefore, *Chimel, supra,* does not apply.

Finally, in *Chambers, supra,* this Court held that, often where an automobile is involved, "the opportunity

to search is fleeting since a car is readily movable . . . Where this is true . . . either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search." 399 U.S. at 52.

In the present case, as in *Coolidge, supra,* the *Chambers* justification is inapplicable. In neither case is the "fleeting target" rationale viable. In *Coolidge, supra,* the authorities had Defendant's vehicle under surveillance for an ample period of time. During this period, Defendant had given no indication that he intended to flee. He was arrested in his house with no access to the automobile. A warrant to search the automobile could and should have been obtained.

In this case, Defendant had been placed under arrest. There was no hint of accomplices conspiring to hijack the automobile from police custody. There were additional police units on the scene. The authorities could have held the vehicle until a search warrant was obtained.

The fact that probable cause was present is not in itself determinative. Defendant's automobile was in no way a "fleeting target". Following his arrest, he had no access thereto. Therefore, search without a warrant was not justified.

As recently stated in *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796 (1973): "Where there are exigent circumstances in which the police action must be *now or never,* to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation". (Emphasis added) 93 S.Ct. at 2802. As shown hereinabove, the instant circumstances hardly presented a "now or never" situation. Defendant was in custody. The policy had ample opportunity to obtain

a search warrant. Failure to do so violated this Court's holding in *Coolidge, supra.*

At this late date, *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, and *Chambers, supra,* do not stand unexplained. Therefore, under this Court's holding in *Coolidge, supra,* the California Court of Appeal was in error in affirming the trial court's admission of evidence seized by said warrantless search.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF HOWARD ALLEN LEVY,
EDWIN S. SAUL,
Attorney for Petitioner.

Of Counsel:
HOWARD ALLEN LEVY.